SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,

Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE COUNCIL ON LEGAL EDUCATION OPPORTUNITY AS AMICUS CURIAE

CRUZ REYNOSO
Chairman, Council on Legal Education Opportunity

ROBERT B. McKAY
Dean
New York University School of Law

ROBERT M. O'NEIL
Executive Vice President
For Academic Affairs
University of Cincinnati

MICHAEL J. MOORHEAD
Executive Director
Council on Legal Education Opportunity
2000 P St., N.W. Suite 300
Washington, D.C. 20036

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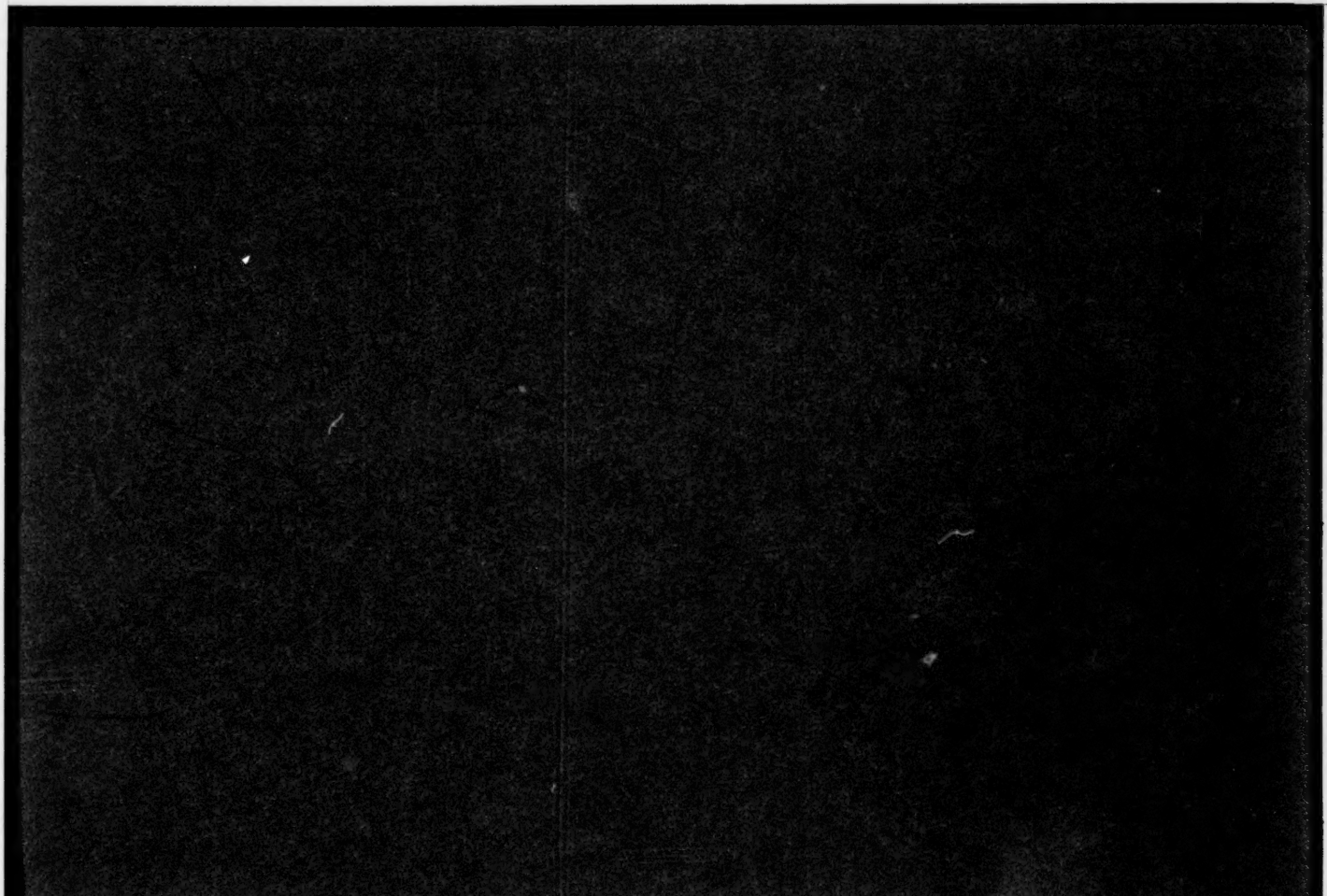

TABLE OF CONTENTS

	Page
TABLE OF CASES AND OTHER AUTHORITIES	ii
CONSENT OF THE PARTIES	1
INTEREST OF AMICUS CURIAE	2
STATEMENT AS TO FACTS	3
SUMMARY OF ARGUMENT	3
ARGUMENTS	4
I. The Supreme Court of Washington Correctly Held That the Constitution Does Not Forbid Consideration of Race in Admissions Decisions	4
A. Lower Federal and State Courts and Governmental Agencies Have Permitted and Even Required Use of Race and Ethnic Status to Relieve Racial Isolation and Exclusion	5
B. Preferential Admissions Programs Based on Race and Those Based on Educational and Economic Deprivation Are Purposively Harmonious and Constitutionally Permissible	10
II. The Court Below Correctly Held That Consideration of Race in Law School Admissions Reflected a Compelling State Interest	15
A. The Underrepresentation of Minority Groups in the Bar Constitutes a Critical National Problem	16
B. The Taking of Race Into Account in Admissions Decisions Is Both a Sufficient and a Necessary Means of Meeting This Problem	20

Page

C. The University of Washington's Admissions Policy Does Not Result in the Admission of "Unqualified" Students 21

D. The Preferential Admission of Certain Minority Applicants Does Not Reflect Exclusive Reliance on Race 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Associated General Contractors v. Altshuler, ___ F.2d ___ (1st Cir. Nov. 30, 1973) 11, 12, 13

Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) 12

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) 7

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) 6, 8

Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 584 (1971) 23

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 8

Keyes v. School District No. 1, 413 U.S. 921 (1973) 8

Loving v. Virginia, 388 U.S. 1 (1967) 15

McLaughlin v. Florida, 379 U.S. 184 (1964) 4, 15

Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938) 9, 22

North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 5

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) 6

Offerman v. Nitkowski, 378 F.2d 22 (2d Cir. 1967) 5

Page

Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973) 12

Pennsylvania v. O'Neill, 348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3rd Cir. 1973) 7

Plessy v. Ferguson, 163 U.S. 537 (1896) 11

Porcelli v. Titus, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) 5, 12

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 4, 12

Sweatt v. Painter, 339 U.S. 629 (1950) 8, 16, 17, 18, 22

Tancil v. Wools, 379 U.S. 19 (1964) 4, 15

TV 9, Inc. v. FCC, ____ F.2d ____ (D.C. Cir. Nov. 6, 1973) 12

Other Authorities:

Gellhorn, The Law School and the Negro, 1968 Duke L.J. 1069 18

O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, 80 Yale L.J. 699, 726-28 (1971) 18

O'Neil, Preferential Admissions: Equalizing Access to Legal Education, 1970 Toledo L.Rev. 281, 295-99 .... 13, 18

Report of the United States Commission on Civil Rights, 117 (1963) 13

Reynoso, La Raza, The Law and the Law Schools, 1970 Toledo L.Rev. 809, 814-16 18

Shuman, A Black Lawyers Study, 16 How. L.J. 23 (1970) 13

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CONSENT OF THE PARTIES

The Council of Legal Education Opportunity appears *amicus*, with consent of both parties, in support of the position advanced by Respondents. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

CLEO, the acronym by which the Council on Legal Education Opportunity is popularly known, is a federally funded program sponsored jointly by the American Bar Association, the Association of American Law Schools, La Raza National Lawyers Association, the Law School Admission Council and the National Bar Association. Its purpose is to provide economically disadvantaged students, many with nontraditional admissions credentials, an opportunity to attend an accredited law school and ultimately to enter the legal profession. To this end CLEO inspires and participates in recruiting programs to inform and encourage students to choose law as a career. It operates, with the cooperation of several accredited law schools, six-week summer institutes which provide selected students a means of identifying their capacity for law study and an opportunity to acclimate to that process.

The overwhelming majority of CLEO program participants are low-income minority students whose academic credentials are such that they would not be admitted on a strictly competitive basis to the schools in which they enroll. For each of the past six years several prelaw institutes were sponsored across the country to assist such students in gaining law school admission; in the summer of 1971, the year of Marco DeFunis' enrollment, the Council sponsored seven institutes. Each institute ran for six weeks and concentrated on instruction in legal analysis and synthesis, as well as, communications skills. These courses were taught by experienced law professors who conducted detailed evaluations of the participants' performance. Successful institute graduates were admitted to over sixty different accredited law schools, including the University of Washington. Nearly every student was accepted on a

preferential or "special" admissions basis and each enrolling student received a living expense stipend during his or her law school tenure.

STATEMENT AS TO FACTS

For a statement of the case, including the facts and the statutory and administrative provisions involved, reference is made to the briefs of the parties.

SUMMARY OF ARGUMENTS

Governmental race consciousness is constitutionally permissible in fashioning remedies for racial isolation and imbalance. Neither a showing of prior explicit discrimination nor a showing that no deprivation will result to others is required before a state university can take race into consideration in selecting among applicants qualified for the study of law.

Consideration of race in law school admission reflects a compelling state interest in that there is a gross underrepresentation of minorities in law schools and the legal profession. The peculiar commitment of the legal profession to the goal of equality and it pervasive influence throughout society renders underrepresentation in this sector a critical national problem.

Considerations of race by the University of Washington were not dispositive of the admissions question. Minorities admitted were in fact qualified students and their inclusion in the law student body was not tantamount to exclusion of nonminority students on the basis of race.

ARGUMENTS

I.

THE SUPREME COURT OF WASHINGTON CORRECTLY HELD THAT THE CONSTITUTION DOES NOT FORBID CONSIDERATION OF RACE IN ADMISSIONS DECISIONS.

This Court has consistently declined to hold that governmental consideration of race is *per se* unconstitutional. Each racial classification brought to this Court has in fact been reviewed with great care and sensitivity. Even where a particular use of race might harm the very groups for whose protection the Fourteenth Amendment was enacted, a *per se* holding has been avoided. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Tancil v. Woolls*, 379 U.S. 19 (1964). Where the use of race has been designed to *relieve* racial isolation or to *enhance* the opportunities of minority groups, the need for care in reviewing classifications has been no less clear.

Three years ago the case of *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), presented the question whether race might be used as a basis for remedies to relieve racial isolation in public school systems. This Court's response was unequivocal:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities." 402 U.S. at 16.

In a companion case, *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), this Court recognized the vital role of race:

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also race must be considered in formulating a remedy." 402 U.S. at 45.

A. Lower Federal and State Courts and Governmental Agencies Have Permitted and Even Required Use of Race and Ethnic Status to Relieve Racial Isolation and Exclusion.

If there is an uncertainty about this Court's view on the propriety of governmental race-consciousness, no doubt exists in the lower federal and state courts. In two distinct areas–elementary and secondary education and public employment–numerous decisions recognize the constitutional validity of remedies framed in terms of race or ethnic status. (E.g., *Offerman v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967).

Several decisions merit more than simple citation because they are particularly apposite here. In *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), the United States Court of Appeals sustained a public school board plan to increase the number of black administrators by bypassing the regular promotion schedule. The court rejected a constitutional challenge by white administrators who ranked above some of the newly preferred blacks and were thus denied employment as a result of the board policy. The Third Circuit's decision clearly recognized the role of race and the permissibility of its use: "State action based partly on considerations of color, when color is not used *per se*, and in furtherance of a proper governmental objective, is

not necessarily a violation of the Fourteenth Amendment." 431 F.2d at 1237.

Another federal court of appeals acknowledged even earlier that race may validly be considered where necessary to correct racial imbalances or isolation. In a redevelopment case involving a race-conscious relocation plan, the Second Circuit declared:

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968).

More recently several courts have gone further and have *required* the use of race to increase minority group representation in public employment. Most of these cases have come not from Southern communities, but from Northern cities such as Philadelphia, Minneapolis and Boston where access to the civil service has never been denied on expressly racial or ethnic grounds. Despite a technically "open" or "nondiscriminatory" public sector, minority groups have been so seriously underrepresented in municipal employment that racially preferential and even quota hiring has been required in a number of cases. E.g., *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). The meaning of these decisions for the present case seems quite clear: Had these communities *voluntarily* adopted preferential programs to increase minority employment, the constitutionality of such remedies would have been, *a fortiori*, beyond doubt.

In several respects the public employment and public school decisions have gone further than did the Washington Supreme Court in this case. First, they have required public agencies to be race-conscious and to prefer minority group members, rather than simply permitting voluntary consideration of ethnic status. Second, they have imposed strict numerical quotas and ratios in hiring patterns, rather than general goals or objectives of the kind announced and applied by the University of Washington Law School. Third, the public employment cases—both those that have allowed and those that have required race-conscious remedies—have often invoked race as the sole criterion for selecting among qualified persons, rather than simply as one element in a complex decision.

It has been argued, however, that such decisions are inapposite here. The claim is that racial classifications are justifiable only where they are designed to remedy prior explicit discrimination or, if such discrimination has not previously existed, only where no deprivation results to other persons. Both distinctions are unsound, if superficially persuasive.

A review of the cases in the public employment sphere reveals that a background of overt racial discrimination is not a prerequisite to race-conscious remedies. Cities like Boston, Philadelphia and Minneapolis have hired relatively few minority policemen and firemen, but not because of any explicit policy against employing blacks or Chicanos. While courts in such cases have found evidence of racial discrimination, that finding has rested upon exclusion or underrepresentation by reason of tests or other employment criteria disadvantageous or unfair to minority groups, and not upon any express color bar. See *Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973); *Carter v.*

Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

Moreover, recent decisions of this Court cast doubt upon the constitutional significance of the distinction between *de jure* and *de facto* racial discrimination. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), this Court observed that "good intent or the absence of discriminatory intent" made no difference in the validity of the testing scheme if the result of that scheme were the exclusion of many minority group applicants. The appropriateness of compensatory remedies which take race into account, in other words, is not confined to situations of *de jure* discrimination. More recently, in *Keyes v. School District No. 1*, 413 U.S. 921 (1973) the distinction was eroded still further. Mr. Justice Powell declared: "The principal reason for abandonment of the *de jure-de facto* distinction is that, in view of the evolution of the holding in *Brown I* into the affirmative duty doctrine, the distinction can no longer be justified on a principled basis." If there is no reason to preserve that distinction in elementary and secondary school desegregation cases, surely the same rationale extends to higher education.

If race could be used only to overcome the effects of past *de jure* discrimination, anomalous results would follow. The very sector involved in this case, law school admissions, illustrates the anomaly. In light of this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), a preferential admissions policy at the University of Texas Law School at Austin would presumably be valid. A comparable policy at the new law school at Texas Tech University would, however, be constitutionally vulnerable because that school never practiced discrimination of the kind struck down in *Sweatt*.

Similarly, the University of Missouri law school at Columbia could presumably prefer minority applicants in light of *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938), while the University of Missouri at Kansas City would be denied recourse to such remedies. The underrepresentation of blacks in the state bar and the critical need for legal services in those communities, would therefore be relevant to one set of state-supported law schools but irrelevant to another because of the accident of history. Try as hard as they might, Texas Tech and Kansas City could never give ameliorative consideration to an applicant's race since neither school ever used race as a barrier to admission.

The perversity of this result indicates the frailty of the distinction between situations in which there has been a history of *de jure* discrimination and those in which there has not. The other proferred distinction seems equally tenuous. It has been suggested that race-based remedies are valid in other contexts because they do not jeopardize legally cognizable interests of majority group members. There is a threshold problem with this distinction: If the interests of plaintiffs in such cases were of doubtful justiciability, one would expect substantial procedural challenges. Yet there appear to be no cases seriously questioning the standing or interests of rejected white job applicants or parents of white children bussed to achieve racial balance. There are, however, more substantial flaws in this argument. While the interests of white students affected by a school desegregation order may be less clear than those of a rejected applicant to law school, the same cannot be said of a white civil servant whose place is taken by a preferred black. Indeed, any distinction may well run in the other direction. A qualified white applicant who is turned down by the University of Washington typically has other options, as did the

petitioner in this case. The white who is denied employment as a policeman or fireman faces alternatives that are certainly no more attractive and perhaps less so—unless, of course, he is prepared and able to move to another community in which no affirmative action program exists.

There is a particular irony about the distinction in this case. Not only was the petitioner admitted to several other accredited law schools; even if no preferential program existed at the University of Washington, his initial ranking among the qualified applicants suggests he would probably not have been admitted in any case. There is an especially tenuous quality to the claim that his interests are judicially cognizable while those of the white fireman in Minneapolis or the white policeman in Philadelphia are not. The conclusion should be clear: The lower federal and state courts have allowed and occasionally even required race-conscious remedies even where (a) there was no history of explicit, *de jure* racial discrimination and (b) majority group members may be displaced or disadvantaged by a preference for minority groups. The propriety of taking race into account in law school admissions decisions should follow *a fortiori*.

B. Preferential Admissions Programs Based on Race and Those Based on Educational and Economic Deprivation Are Purposively Harmonious and Constitutionally Permissible

Amici curiae in support of petitioner argue that there was no attempt on the part of the University of Washington to scrutinize individual files, or the files of all applicants regardless of race, to determine whether those to be preferentially admitted were in fact disadvantaged, either in an educational or economic sense. As their argument continues, the University posits race as the *sine*

qua non of disadvantaged status and attempts to hurdle the constitutional barrier to race by drawing a false equation between it and the deprivation required to warrant preferential treatment in the admissions process. This line of argument has two basic flaws: First, it poses a colorblindness to the Constitution that stems from myopia and attributes a literal interpretation to that concept that has never been judicially acknowledged. Second, it draws a rigid dichotomy and subtly attempts to establish a conflict which has no basis either in logic or in constitutional dogma. As indicated by Chief Judge Coffin, writing for a unanimous court in *Associated General Contractors v. Altshuler*, ___ F.2d ___ (1st Cir., Nov. 30, 1973):

> "The first Justice Harlan's much quoted observation that 'the Constitution is colorblind . . . (and) does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights', *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (dissenting opinion) has come to represent a long term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." (Sl. Op. at 11)

Pursuit of color consciousness in order to hasten the advent of a truly colorblind approach to admission does not foreclose or conflict with the simultaneous application of a racially neutral preferential admissions system

which takes into account the economic and the educational deprivations resulting from environmental factors. Indeed, at least one Southwestern law school has formalized its own special admissions program which does exactly this and several law schools in the Appalachian region consider background deficiencies of capable nonminority applicants, as well as minorities, in determining preference. Whether the Constitution requires such balance is an open question. Seemingly there is little question as to its constitutional permissibility and its educational and moral warrants.

The recognition of race in the law school admissions process, as has been judicially approved in a number of other contexts, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Associated General Contractors v. Altshuler*, ___ F.2d ___ (1st Cir. Nov. 30, 1973); *TV 9, Inc. v. FCC*, ___ F.2d ___ (D.C. Cir. Nov. 6, 1973); *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), will only speed the day when this dual approach will be rightly sacrificed to the longer term goal of colorblind admissions. The stark fact is that all minority enrollments from academic 1968-1969 to academic 1973-1974 rose from 1,902, in a total law school enrollment of 68,779, to 7,601 in a total law school enrollment of 106,760, only because law schools established affirmative action programs. But these innovations have merely carried us to the brink of progress. Now ironically we are met by opposing arguments that the constitutional fuels which propelled us to the brink are themselves offensive to that very source of legal power. While the argument in the abstract is sound, it is untimely pressed. The subordinate argument that preferences are quotas and quotas are inherently evil and

constitutionally offensive is less sound and ignores the potential use of preferences for remedial and utilitarian purposes. Admittedly, racial classifications deserve particular scrutiny; "their purpose may become perverted: a benign preference under certain conditions may shade into malignant preference at other times." (*Altshuler*, Sl. Op. at 14-15).

Nonetheless, the compelling need to create racial balance in law schools and the legal profession is manifest. Perhaps more than any other the legal profession reflects the values and mores of the dominant cultural group in America. This relationship between the larger society and legal institutions has been one of the primary reasons that minorities have been systematically denied access to the profession. Because of the pervasive impact of law throughout our society, the discriminations which infected the larger society were perhaps even more virulent and detrimental in legal educational institutions. Report of the United States Commission on Civil Rights 117 (1963); Shuman, *A Black Lawyers Study*, 16 How. L. J. 23 (1970). As a result of the invidious racial and ethnic discriminations which are now a part of history, the communities of minority citizens in this country have for the most part gone underrepresented and in many cases unrepresented. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 Toledo L. Rev. 295-99.

In an effort to remedy the effects of a long history of discrimination many law schools, like the University of Washington, have instituted programs of varying quality and effectiveness. The stated goal of these programs has been to increase the number of ethnic and racial minority lawyers in the country. This has been done without regard to specific quotas or the creation of precisely balanced racial and ethnic proportions in the profession.

It has been argued that there is no sound undergirding policy which requires that each profession reflect the racial composition of the national population. Parity, as such, should not be our long range ambition. Yet, until such time as the gross disparity which now characterizes the profession is eradicated and true openness is established, law schools must act affirmatively to meet their responsibility of providing equal opportunities for all. It is not enough to merely acknowledge past shortcomings and presently announce that admissions are now available to all qualified applicants, when the criteria for admissions are blind to those past shortcomings and ignore yesterday's injustices. More sinister than unequal treatment is the appearance of equality when inequality abounds.

The University of Washington, as well as other law schools serving both state and national constituencies, has recognized this and with no disparagement of the ability of traditional admission indicies to predict law school performance, set up a preferential system of screening and admitting students from designated minority groups which were not sufficiently represented in the non-preferential screening. The University recognized the simple fact that when nationally utilized predictive indicies were colorblindly applied the result was the exclusion of minorities. Indeed, few, if any, minorities would have been members of Washington's 1974 graduating class but for the preferences accorded. To avoid this result, the University screened minority students separately and selected capable students who demonstrated a reasonable prospect for success in law school. Other such students were admitted only after their successful completion of a prelaw CLEO summer institute. This approach, which has been replicated on a national level, has hastened the day of true colorblindness in law school admissions and has brought us to the brink of progress in creating an open legal profession.

II.

THE COURT BELOW CORRECTLY HELD THAT CONSIDERATION OF RACE IN LAW SCHOOL ADMISSIONS REFLECTED A COMPELLING STATE INTEREST.

The Supreme Court of Washington assumed that the proper test of review was whether the use of race was supported by a "compelling state interest". This Court's reference to such a standard e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967), has involved (a) classifications detrimental to minority groups and (b) criminal or other very severe sanctions. It can certainly be argued that where the classification benefits minority groups and is not backed by criminal sanctions, a less rigorous standard of review should apply. Cf. *Tancil v. Woolls*, 379 U.S. 19 (1964). Yet the Washington Supreme Court adopted the strictest test and went on to find the admissions process constitutionally valid even under that test. Accordingly, we assume that a compelling state interest must be shown.

It has been suggested by *amici curiae* that nothing less than amelioration of past racial discrimination will meet the "compelling state interest" test, and that only the agency responsible for the discrimination may constitutionally relieve its effects. While undoubtedly such a purpose would meet the test, no decisions of this Court indicate that the test should be so limited—that other substantial governmental goals and objectives may not also be "compelling state interests". Clearly persuasive in defining the test here is the fact that Washington's highest court found the law school's stated goals to constitute a compelling state interest. While the ultimate constitutional issue is of course before this Court, the careful judgment of the state supreme court on a matter of state interest surely merits substantial deference.

It has also been argued that the evidence of the state interest is insufficient, or that the Washington Supreme Court has cited inadequate indicia. The critical issue under this rubric is the *existence* of the state interest and its constitutional value, not the *methods* by which the state or its agencies have articulated that interest. Thus it should be irrelevant, for example, whether the University of Washington fully recited in catalogues and other publications the interests underlying its preferential admissions policies. The critical issue, to which we now turn, is whether those interests themselves are constitutionally compelling.

A. The Underrepresentation of Minority Groups in the Bar Constitutes a Critical National Problem.

The organized bar and the law schools have only recently become aware of the critical shortage of minority group attorneys and have taken steps to alter that condition. The importance of diversity in the bar and in law school student bodies is, however, not a recent discovery. Nearly a quarter century ago this Court held, in *Sweatt v. Painter*, 339 U.S. 629 (1950), that Texas could not constitutionally exclude all black applicants from state university law schools when comparable opportunities were unavailable elsewhere in the state. Chief Justice Vinson wrote for the Court:

> "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed form the interplay of

> ideas and the exchange of views with which the law is concerned . . . . With such a substantial and significant segment of society excluded [from the alternative black law school] we cannot conclude that the education offered . . .is substantially equal to that [offered by the University of Texas]." 339 U.S. at 634.

The faculties and students of the law schools of the United States have come increasingly to realize not only the importance of these goals announced by Chief Justice Vinson, but also the difficulty of achieving them. Despite the elimination of virtually all direct barriers to minority applicants, and the reduction of some indirect obstacles (for example, through increased recruitment efforts and financial aids), the nonwhite share of law students–outside the few predominantly black schools–barely increased between the time of the *Sweatt* decision and the mid-1960's. Thus it became apparent that a policy stronger than simple "nondiscrimination" or "color-blindness" might be needed to achieve meaningful integration.

The current commitment to increasing minority participation is fundamentally an *educational* commitment (St. 147, 218). Law school teachers and administrators have come increasingly to feel that the study of law in a racial or ethnic vacuum would be as remote from real life as would a law school curriculum lacking any practical component. Since minority groups, including their legal problems and concerns, play an increasing role in national life, legal education must fully involve and include those groups.

Moreover, the legal profession and the law schools have a special commitment to the goal of equality. If racial and ethnic exclusion is unacceptable for any professional or educational body, such conditions would be par-

ticularly reprehensible in a profession sworn to sustain the constitutional mandates of equality. Thus it is appropriate for the law schools to take the initiative, as they have at some colleges and universities, in developing measures to expand educational opportunities for excluded groups (St. 123, 419).

In addition to the importance of diversity in law schools, there is also a need to ensure equality in access to the legal profession. It is axiomatic that there can not be more minority group attorneys without increasing the number of minority law students. It is equally clear that the effectiveness of minority attorneys depends significantly on the quality of legal education available to them—another point stressed by the Supreme Court in *Sweatt v. Painter*, 339 U.S. 624 (1950). Only recently have national legal organizations become fully aware of the extent and effects of minority underrepresentation in the bar. Recent surveys reveal that scarcely 1% of the bar of the United States is black, and that even greater inequities exists for other minority groups such as Mexican-Americans, Puerto Ricans and American Indians. (For data and analysis concerning minority underrepresentation, see, *e.g.*, O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L. J. 699, 726-28 (1971); O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 Toledo L. Rev. 281, 295-99; Gellhorn, *The Law Schools and the Negro*, 1968 Duke L. J. 1069; Reynoso, *La Raza, The Law and the Law Schools*, 1970 Toledo L. Rev. 809, 814-16.)

The effects of such drastic imbalance may be harder to assess than the raw data. Yet clearly an unmet need for legal services exists in the poor and disadvantaged community—a need that can be met only partially through temporary legal services programs and volunteer

agencies staffed by white attorneys who do not know the community (and in the case of the barrio may not even speak the language well). Moreover, the importance of furnishing "models" of professional and career opportunity to the young men and women of minority communities cannot be doubted. Whether the path to participation lies through private practice or politics it disproportionately requires access to the legal profession–access that has for generations been virtually unavailable to disadvantaged youth from minority groups. It is this situation that the nation's law schools and legal organizations have recognized and seek to alleviate.

Doubt has been cast upon the applicability of this analysis to the University of Washington's admissions criteria. The proportion of blacks in the general population of Washington and surrounding states is said to have approximated the share of blacks in the law school enrollment. There are a number of answers. First, the need and the problem to which the University of Washington addressed itself is a *national* problem. Lawyers do not study and remain in a single state, as increasing use of the national bar examination indicates. Nor can a law school which draws its students from the entire nation confine its policies to strictly local needs. Second, even if Washington state were the relevant market, the percentage of blacks in the bar in the late 1960's presumably fell short of proportionality. Since the goal of the admissions program was to increase the number of black *lawyers* and not simply *law students*, the bar figures would be more relevant than the enrollment ratios. Third, the representation of other minority groups--both in the bar and in the law student body–must be considered as well.

If, however, the validity of a preferential admission program depended entirely on local demographic data, the consequences would be bizarre. The University of California at Berkeley and UCLA could take race into account, while the University of Washington could not. The University of Maine could prefer Indians but not blacks. Ironically, those law schools in areas of relatively low minority population could not preferentially increase their small minority enrollments, while schools located in areas of high minority concentration would be left to intensify an already heavy burden. What the University of Washington has tried to do is to meet a national as well as a local problem. It would be the height of irony to hold that the scope of its effort is constitutionally constrained by the present population ratios. Such a judgment would contain the very vice of strict quota admissions which the University of Washington, acting flexibly, sought to avoid.

B. The Taking of Race Into Account in Admissions Decisions Is Both a Sufficient and a Necessary Means of Meeting This Problem.

If the goals outlined above could be met without considering race or ethnic group membership, the case might be less persuasive. But there now appears to be no viable alternative. Clearly simple "non-discrimination" will not measurably enhance graduate and professional opportunities for minority students, since the bar membership figures cited earlier have remained remarkably constant despite the formal elimination of racial discrimination by all law schools. The causes of the problem lie deeper, suggesting that the rigid and unbending application of quantitative admissions criteria would continue to exclude the bulk of qualified minority applicants.

The foregoing argument contains an important caveat. No race-conscious or preferential program should exceed the period of its justification. The need for ameliorative admissions policies is hopefully a temporary one. Several forces already at work should gradually diminish that need—the steadily increasing number of minority college graduates; the improving quality of undergraduate education for minority students; the increasing availability of financial aid for minority students; the existence of supplemental education programs for such students; the growing representation of minority groups on law faculties; and the wider dissemination of information about minority career opportunities in law. When such factors bring minority groups into a fully competitive admissions position, the rationale for special or racially preferential admissions programs would presumably cease and such programs should terminate.

C. The University of Washington's Admissions Policy Does Not Result in the Admission of "Unqualified" Students.

It has been charged, and is suggested in some briefs in this case, that the policy under review resulted in the admission of students who were "unqualified" to study or practice law. Clearly that is not the case. In recent years, the number of applicants for law schools has grown so much faster than the number of available positions that many schools have far more qualified candidates than they can accept. The admissions process thus requires a complex selection among a larger number of persons, who could complete the law school curriculum and enter the legal profession. Under these circumstances, it is impossible to apply strict numerical rankings; at the center of the applicant curve, a small fraction of a point

may reflect dozens of persons. Thus, inevitably non-numerical criteria enter the process.

The claim that unqualified students are preferentially admitted also assumes that "qualification" can be measured solely by quantitative tests. Most law schools, including the University of Washington, make that judgment in subtler and more complex ways and look to factors other than LSAT scores and undergraduate grades as predictors of success. Individual students may in fact be "preferred" because of age, experience, interests, undergraduate major, declared commitment to a special field of law, recommendations, etc. Many admissions decisions may and do depart from strict neutrality on grounds having nothing whatever to do with race.

D. The Preferential Admission of Certain Minority Applicants Does Not Reflect Exclusive Reliance on Race.

The superior court found that certain minority applicants were admitted to the University of Washington law school with lower test scores and college grades than certain rejected nonminority applicants. The significance of this finding can easily be exaggerated. Clearly race was not the sole or dispositive factor. The vast majority of the applicants who were accepted were white-Anglo, as were the bulk of those rejected. This case is a far cry from those in which, cf. *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), all persons of a given race or ethnic group were completely barred from law school. Nor was there any predetermined number of "slots" which would be filled by minority applicants regardless of qualification or preparation. In fact, there does not appear to have been even the kind of "goal" or "range" for minority

representation that has been sanctioned in other contexts, cf. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 584 (1971).

Each admissions decision was made carefully on the basis of a number of factors, and the number of minority students in the first year class resulted from this complex process. Various elements were given preferential consideration—much as the petitioner argued in his complaint that as a taxpayer and resident of the State of Washington he should be entitled to favorable treatment. The exercise of professional judgment in each case is an essential element in the University of Washington's law school admissions process.

Moreover, some of the minority students were admitted only after and on the basis of satisfactory completion of a CLEO institute—a supplemental, pre-law program taught by regular law faculty members, dealing with pertinent material and evaluated in accordance with law school criteria. In such cases, the tempering of the admissions judgment reflected the experience and success in the institute quite as much as it reflected race or ethnic status. If this Court were to hold that CLEO students (having successfully completed the institute) could not be admitted ahead of other students who had received no such pre-law training, that would effectively nullify the educational value of the institute.

Moreover, the role of race is qualified by the ameliorative effects of certain financial aid funds available to minority students. CLEO graduates, for example, begin each year with a guaranteed stipend in addition to whatever scholarship, loan and work-study funds are provided by the school itself. Many other applicants bring to law school pressing financial needs with less hopeful prospects for their alleviation. An admissions committee

might reasonably conclude that a minority student, thus assisted, was a better risk than a non-minority student less well provided for.

Supplemental education assistance may have a similar effect. Many law schools have adopted special co-curricular and tutorial programs for disadvantaged and minority students, designed to supplement deficiencies in undergraduate education. The effect of these programs on minority student attrition rates has been impressive. A law school admission committee might conclude that the availability of such a program, like special financial aid, would improve a minority applicant's prospects and thus further justify a preferential admission decision.

Finally, an admissions committee might well take into account certain critical needs for legal services in deciding which qualified applicants should be admitted. Since the greatest needs exist in the socio-economically disadvantaged areas, a preference for students from those areas might be justified by the belief that such students would return to their communities after graduation. (Important values may be served even if they do not return--for example, the diversification of the bar and the creation of "role models" for younger members of historically underrepresented groups. Thus there need be no proof of a commitment to return to the community of origin to justify such a preference.)

A policy of race-conscious admissions such as that adopted by the University of Washington seeks to meet a critical national problem in the only way that has been found workable and effective. It does so by taking race into account along with many other factors in selecting a relatively small class from a large pool of qualified applicants. If this Court were to hold that race and ethnic status can play no part whatever in the admissions process, such a holding would virtually ensure a con-

tinued and severe underrepresentation of minority groups in the American legal profession.

CONCLUSION

For the foregoing reasons *amicus curiae* respectfully submits that the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

CRUZ REYNOSO
Chairman, Council on Legal
Education Opportunity

ROBERT B. McKAY
Dean
New York University
School of Law

Of Counsel:

ROBERT M. O'NEIL
Executive Vice President
For Academic Affairs
University of Cincinnati

MICHAEL J. MOORHEAD
Executive Director
Council on Legal Education
Opportunity
2000 P St., N.W. Suite 300
Washington, D.C. 20036